National Land Finance Co-operative Society Ltd v Director General of Inland Revenue

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 506 OF 1987
GUNN CHIT TUAN CJ (MALAYA), MOHAMED AZMI SCJ AND LC VOHRAH J
10 NOVEMBER 1993

Revenue Law *— Income tax — Co-operative society — Exemption — Amendment to remove exemption — Whether retrospective — Income Tax Ordinance 1947 s 13 — Income Tax Act 1967 Sch 9 para 33 — Income Tax (Amendment) Act 1980*

Statutory Interpretation *— Strict interpretation — Retrospective effect of taxing statute — Construction not to affect vested rights — Interpretation Acts 1948 and 1967 s 30*

The Special Commissioners of Income Tax had in 1987 found that the appellant was a society registered under the Co-operative Societies Ordinance 1948 and was therefore exempted from payment of income tax under s 13(i)(f)(ii) of the Income Tax Ordinance 1947 ('the Ordinance'). The Income Tax Act 1967 ('the Act') repealed the Ordinance but the exemption conferred by the Ordinance was continued by para 33 of Sch 9 of the Act. In case No PKR 256, the special commissioners had discharged assessments of tax raised against the appellant and held that by virtue of para 33, the appellant continued to enjoy the exemption. In 1980, the Income Tax (Amendment) Act 1980 ('the Amendment Act') removed the exemption and moreover, by s 1(5), the amendment to para 33 of the Act was made retrospective to the year of assessment 1968. The Director General of Inland Revenue ('the Revenue') therefore raised assessments afresh on the appellant for the years of assessment 1977–1981. The special commissioners subsequently discharged the assessments and held that the amendment to para 33 of Sch 9 of the Act did not have the effect of removing the exemption from tax. On appeal by the Revenue, the High Court reversed the decision of the special commissioners and held that the appellant no longer enjoyed the exemption by virtue of the amendment. The appellant appealed.

Held, allowing the appeal:

(1) In this case, it was clear that the appellant had an acquired right to exemption under the Ordinance when the Act came into force. That acquired right which was confirmed by the special commissioners in case No PKR 256 should only be overruled prospectively and not retrospectively.

(2) Although the legislature had made its intention clear in s 1(5) of the Amendment Act that s 16 therein which amended Sch 9 of the Act shall be deemed to have effect for the year of assessment 1968 and subsequent years of assessment, the amending Act did not expressly provide that Pt I of the Interpretation Acts 1948 and

1967 shall not apply. There was therefore a doubt whether the legislature had intended to impair the existing right of the appellant and inflict a detriment to it as it takes away a vested right under the existing law to exemption from tax. As there was a doubt, the ambiguity must be construed in favour of the appellant as the exemption from tax had not been removed by sufficiently clear words to achieve that purpose.

[Bahasa Malaysia summary

Pesuruhjaya Khas Cukai Pendapatan telah memutuskan pada tahun 1987 bahawa perayu adalah sebuah kesatuan yang didaftar di bawah Ordinan Kesatuan Koperasi 1948 dan oleh itu terkecuali daripada membayar cukai pendapatan di bawah s 13(i)(f)(ii) Ordinan Cukai Pendapatan 1947 ('Ordinan itu'). Akta Cukai Pendapatan 1967 ('Akta itu') telah memansuhkan Ordinan itu akan tetapi pengecualian yang diberikan oleh Ordinan itu telah diteruskan oleh perenggan 33 Jad 9 Akta itu. Di dalam kes No PKR 256, pesuruhjaya khas telah membatalkan taksiran cukai yang dibuat terhadap perayu dan memutuskan bahawa di bawah perenggan 33, perayu terus menikmati pengecualian itu. Pada tahun 1980, Akta Cukai Pendapatan (Pindaan) 1980 ('Akta Pindaan itu') telah menyingkir pengecualian itu dan lebih-lebih lagi, s 1(5), pindaan kepada perenggan 33 Akta itu, dijadikan berkuatkuasa kebelakangan hingga tahun taksiran 1968. Oleh itu, Ketua Pengarah Jabatan Hasil Dalam Negeri ('Jabatan Hasil') telah mengeluarkan taksiran baru ke atas perayu bagi tahun taksiran 1977–1981. Pesuruhjaya khas kemudiannya telah membatalkan taksiran itu dan memutuskan bahawa pindaan kepada perenggan 33 Jad 9 Akta itu tidak berkesan menyingkirkan pengecualian daripada cukai. Atas rayuan oleh Jabatan Hasil, Mahkamah Tinggi telah mengakaskan keputusan pesuruhjaya khas dan memutuskan bahawa perayu tidak lagi menikmati pengecualian disebabkan oleh pindaan itu. Perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Di dalam kes ini, adalah jelas bahawa perayu mempunyai hak yang diperolehi untuk mendapat pengecualian di bawah Ordinan itu apabila Akta itu berkuatkuasa. Hak yang diperolehi itu yang telah diesahkan oleh Pesuruhjaya Khas Cukai Pendapatan dalam kes No PKR 256 hanya sepatutnya ditolak pada masa akan datang dan bukan secara kebelakangan.

(2) Sungguhpun badan perundangan telah membuat tujuannya jelas dalam s 1(5) Akta Pindaan bahawa s 16 di dalamnya yang meminda Jad 9 Akta itu hendaklah dianggap berkesan untuk tahun taksiran 1968 dan tahun-tahun taksiran kemudiannya, Akta Pindaan itu tidak memperuntukkan dengan nyata bahawa Bah 1 Akta Tafsiran 1948 dan 1967 tidak akan terpakai. Oleh itu, timbul keraguan sama ada badan perundangan bertujuan untuk mengurangkan hak perayu yang wujud dan memudaratkannya kerana ia

menyingkirkan suatu hak kukuh di bawah undang-undang yang sedia ada untuk mendapatkan pengecualian cukai. Oleh kerana terdapat keraguan itu, ketaksaan itu hendaklah ditafsirkan memihak kepada perayu kerana pengecualian cukai itu tidak disingkirkan dengan perkataan yang cukup jelas untuk mencapai maksud itu.]

Notes

For cases on construction of statutes having retrospective effect, see 11 *Mallal's Digest* (4th Ed) paras 1402–1407.

For cases on exempt income, see 10 *Mallal's Digest* (4th Ed) paras 1611–1612.

Cases referred to

1 *Cape Brandy Syndicate v Inland Revenue Commissioners* 12 TC 358 (folld)
2 *Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1; [1982] 3 All ER 833 (folld)
3 *Pearce v Secretary of State for Defence and Ministry of Defence* [1988] AC 755; [1988] 2 All ER 348; [1988] 2 WLR 1027 (refd)
4 *Floor v Davis (Inspector of Taxes)* [1980] AC 695; [1979] 2 All ER 677; [1979] 2 WLR 830 (folld)
5 *Liyanage & Ors v R* [1967] 1 AC 259; [1966] 1 All ER 650; [1966] 2 WLR 682 (not folld)
6 *Government of Malaysia v Zainal bin Hashim* [1977] 2 MLJ 254 (not folld)
7 *Keith Sellar v Lee Kwang; Tennakoon v Lee Kwang* [1980] 2 MLJ 191 (not folld)
8 *James v Commissioner of Inland Revenue* 51 TC 628 (not folld)
9 *Re Micklewait* (1855) 11 LJ Ex 452 (folld)
10 *Oriental Bank Corp v Wright* (1880) 5 App Cas 842 (folld)
11 *EWP Ltd v Moore* [1992] 1 All ER 880 (folld)

Legislation referred to

Income Tax (Amendment) Act 1980 s 1(5)
Interpretation Act 1967 ss 2(3), 30

CV Das (*Dr A Subramaniam* and *John Matthew* with him) (*Skrine & Co*) for the appellant.

Abdul Karim bin Abdul Jalil (*Abdul Halim bin Aman* with him) (Senior Federal Counsel) for the respondent.

Cur Adv Vult

Gunn Chit Tuan CJ (Malaya) (delivering the judgment of the court): This appeal by the National Land Finance Co-operative Society Ltd ('the taxpayer') raised the question whether the words of the amendment made by the Income Tax (Amendment) Act 1980 ('the Amendment Act') to para 33 of Sch 9 of the Income Tax Act 1967 ('the Act') was capable of

removing the exemption from tax granted to the taxpayer by s 13(1)(f)(ii) of the Income Tax Ordinance 1947 (Repealed) ('the Ordinance'). A

The Special Commissioners of Income Tax in their deciding order dated 10 June 1987 found that the taxpayer was a society registered on 4 June 1960 under s 7 of the Co-operative Societies Ordinance 1948. It was therefore exempted from payment of income tax under the said s 13(1)(f)(ii) of the Ordinance which conferred exemption from the payment of income tax on any co-operative society registered under the law in force relating to the registration of co-operative societies. The Act came into force on 28 September 1967 and repealed the Ordinance and sub-s 3 of s 1 of that Act stipulates that the Act shall have effect for the year of assessment 1968 and subsequent years of assessment. The exemption conferred by the Ordinance, was continued by para 33 of Sch 9 of the Act and by the said para 33 that exemption was 'deemed to have been made by an order under s 127 of the Act'. B C

There was no dispute that para 33 of Sch 9 of the Act continued the previous exemption under the Ordinance. The Director General of Inland Revenue ('the Revenue') had previously disputed that the exemption was continued under the Act and had raised tax on the taxpayer for the years of assessment 1968–1975 under the Act when it came into force. In a case No PKR 256, the Special Commissioners of Income Tax had discharged those assessments on 2 November 1978 and held that the taxpayer continued to enjoy the exemption by virtue of the said para 33 read with s 156 of the Act relating to transitional and saving provisions. It was held by the special commissioners that those provisions prevailed over para 12 of Sch 6 of the Act which limited exemptions from tax for co-operative societies. The Revenue accepted that decision as good law for the purposes of the present appeal. But the Revenue also contended that the amendment to the proviso to the said para 33 by the Amendment Act, which came into force on 1 February 1980, had removed the exemption and moreover by s 1(5) of that Amendment Act, the amendment to para 33 of the Act was made retrospective to the year of assessment 1968. Therefore acting under the Amendment Act, the Revenue raised assessments afresh on the taxpayer for the years of assessment 1977–1981. D E F G

In a deciding order given on 10 June 1987, the special commissioners discharged the said assessments and held that the amendment to para 33 of Sch 9 of the Act did not have the effect of removing the exemption from tax. On appeal by the Revenue, the High Court on 19 October 1987, reversed the decision of the special commissioners and held that the taxpayer no longer enjoyed the exemption by virtue of the said amendment. Unfortunately no written grounds of judgment are available although this appeal has been adjourned several times by the Supreme Court to enable the learned judge to give his grounds of decision. H

On appeal before us on 11 October 1993, Mr CV Das, leading counsel for the taxpayer, contended that the learned judge had misconstrued the said amendment and the effect it had on para 33 of Sch 9 of the Act. He pointed out that para 33 remained the same and that the only change made I

by the Amendment Act was the alteration of the proviso to para 33 by the addition of a para (a) which reads as follows:

> Provided that this paragraph shall not apply in relation to —
>
> (a) any such exemption for which provision is made, with or without modification, in this Act; ...

Counsel contended that in construing the said amendment, certain principles relating to the interpretation of taxing statutes must be followed. Firstly, there is no room for intendment in tax legislation and the rule of strict construction applies. Unless there are clear words, tax cannot be imposed (per Rowlatt J in *Cape Brandy Syndicate v Inland Revenue Commissioners*[1]). Another principle is that where the meaning of a statute is in doubt, the ambiguity must be construed in favour of the subject. Yet another principle is that an exemption from tax cannot be removed except by sufficiently clear words to achieve that purpose.

On the question of the retrospectivity of the amendment, counsel pointed out that by s 1(5) of the Amendment Act, the amendment to para 33 of Sch 9 of the Act was backdated to 1968. That technically covers the period backwards of 12 years from 1980 when the Amendment Act came into force and is allowable for assessments and additional assessments of back tax under s 91 of the Act. The Revenue had therefore raised tax going back to the years of assessment 1977–1981 and in doing so had proceeded on the assumption that the taxpayer had lost the exemption from tax not prospectively but retrospectively. Counsel for the taxpayer contended that s 1(5) of the Amendment Act which made the amendment retrospective is bad in law as it deprived the taxpayer of an existing and acquired right which is protected by s 30(1)(b) of the Interpretation Acts 1948 and 1967.

It was also the contention of counsel that a statute would not be read retrospectively to deprive someone of existing and acquired rights and he referred to the Privy Council case of *Yew Bon Tew v Kenderaan Bas Mara*[2] and the House of Lords case of *Pearce v Secretary of State for Defence and Ministry of Defence*[3] to support his contention. Counsel referred us specifically to the speech of Lord Brightman in *Yew Bon Tew*'s case[2] where his Lordship said as follows [at p 2]:

> There are two other statutory provisions which are relevant. Section 13 of the Interpretation and General Clauses Ordinance 1948 provided that:
>
> > 'Where a written law repeals in whole or in part any other written law, then, unless the contrary intention appears, the repeal shall not ...
> >
> > (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed.'
>
> This Act was replaced by the Interpretation Act 1967 s 30(1)(b) of which says the same thing in different words.

Counsel contended that the taxpayer's acquired right was even stronger under the present s 30 of the Interpretation Acts 1948 and 1967 which reads as follows:

Matters not affected by repeal.

(1) The repeal of a written law in whole or in part shall not —

(a) affect the previous operation of the repealed law or anything duly done or suffered thereunder; or
(b) affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law; or
(c) affect any penalty, forfeiture or punishment incurred in respect of any offence committed under the repealed law; or
(d) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been made.

(2) Without prejudice to the generality of subsection (1) —

(a) the repeal of a written law which adopts, extends or applies another written law shall not —

(i) invalidate the adoption, extension or application; or
(ii) prejudicially affect the continued operation of the adopted, extended or applied law; and

(b) the repeal of a written law which amends another written law shall not —

(i) invalidate the amendments made by the repealed law; or
(ii) prejudicially affect the continued operation of that other law as amended.

Mr Das also contended that the exemption granted to the taxpayer is a substantive right because by s 127(5) of the Act any of its income was not to be taxed as income for the purpose of tax. He pointed out that the Interpretation Acts 1948 and 1967 applies for the construction of a taxing statute and referred us to the House of Lords case of *Floor v Davis (Inspector of Taxes)*[4] in which case Viscount Dilhorne, Lord Diplock and Lord Edmund-Davies all held that in construing provisions of the UK Finance Acts, one must, as when construing provisions of other Acts, have regard to the Interpretation Act. It must be borne in mind that the Interpretation Acts 1948 and 1967 is to apply unless a contrary intention is shown. It is not the case that an intention that the Act should apply has to be shown for it to apply.

Counsel then contended that the retrospection by s 1(5) of the Amendment Act to 1968 was constitutionally bad because it had the effect of nullifying the decision of the special commissioners given in PKR 256 in November 1978 in respect of the years of assessments 1968–1975. He contended that it violated the essential constitutional principle inherent in a government structured under the separation of powers doctrine that a judicial decision cannot be nullified by a legislative act, although it may be changed prospectively by legislative enactment. In support of his contention he referred to the Privy Council case of *Liyanage & Ors v R*,[5] and pointed out that although tax was not levied for the period 1968–1977, the

amendment has the effect, according to the Revenue's interpretation, of making the taxpayer liable to tax for the whole backdated period. He stated that by a judicial decision between the same parties it had been decided that the taxpayer was not liable for tax even after 1967. He pointed out that the interpretation contended for by the Revenue would necessarily involve nullifying the decision of the special commissioners as to the post-1967 tax liability of the taxpayer at least for a period of 12 years going back to 1968. Counsel also contended that inasmuch as the Revenue relied on a law that has to treat the judicial decision as inoperative, such a law is constitutionally bad under our separation of powers doctrine based on *Liyanage*'s case.[5] He contended that s 1(5) of the Amendment Act is therefore bad in law and unenforceable and the assessments enabled by it retrospectivity should therefore be discharged.

It was the submission of the Revenue that the words of the amendment to the proviso to para 33 of Sch 9 of the Act made by the Amendment Act had the effect of qualifying the provisions of that paragraph in the Act. Quite apart from the clear construction of the said proviso, it was also contended by the Revenue that it is necessary and relevant also to refer to the scheme of the Act and the history leading to the said amendment. The scheme of the Act was to subject the income of co-operative societies to tax unless the income falls within the ambit of para 12 of Sch 6 of the Act. The amendment was also as a result of the decision in the case No PKR 256 as it was the intention to overrule that decision. The leading Revenue counsel, Encik Abdul Karim bin Abdul Jalil, contended that it was the intention of the legislature that the said proviso was to qualify para 33 of Sch 9 of the Act and the Amendment Act had the effect of qualifying the said Sch 9.

The Revenue did not dispute that the taxpayer's income was exempted from income tax under the repealed Ordinance, and that the status was saved by s 156 of the Act read with para 33 of Sch 9. It was contended, however, that the operation of the main provision of para 33 was now subjected to the qualification or limitation provided in the proviso thereto as amended by Amendment Act. It was also pointed out that it is a fact that provisions have been made in para 12 of Sch 6 of the Act in respect of a qualified exemption on income of co-operative societies. But it was contended by the Revenue that the proviso to para 33 of Sch 9 had the effect of qualifying the application of the main para 33 and that the learned judge was right in his interpretation of the said proviso. Revenue counsel also pointed out that retrospective tax legislation is possible if it is expressed in clear terms and referred to A *Simon's Taxes* at p 225, wherein it is stated that:

> A statute is construed as having retrospective effect only if its retrospective operation is stated in clear terms or arises by necessary and distinct application from its terms.

Three cases were cited in support of the above statement, viz *Government of Malaysia v Zainal bin Hashim*,[6] *Keith Sellar v Lee Kwang; Tennakoon v Lee Kwang*,[7] *James v Commissioners of Inland Revenue*.[8] Reference was also made to s 2(3) of the Interpretation Acts 1948 and 1967, which states as follows:

Part I shall not apply where there is — A

(a) express provision to the contrary; or
(b) something in the subject or context inconsistent with or repugnant to its application.

But it was the contention of the Revenue that in the present appeal, the Amendment Act by s 1(5) therein has provided as follows: B

> Section 16 amending the proviso to paragraph 33, the disputed proviso — shall be deemed to have effect for the year of assessment 1968 and subsequent years of assessment.

It was the Revenue's submission that the intention to make the amendment retrospective was in clear terms and therefore valid. C

There are ample authorities to show that courts have refused to adopt a construction of a taxing Act which would impose liability when doubt exists. In *Re Micklewait*[9] it was held that a subject was not to be taxed without clear words. We realize that revenue from taxation is essential to enable the Government to administer the country and that the courts D should help in the collection of taxes whilst remaining fair to taxpayers. Nevertheless, we should remind ourselves of the principle of strict interpretation as stated by Rowlatt J in *Cape Brandy Syndicate v Inland Revenue Commissioners*:[1]

> ... in a taxing Act one has to look merely at what is clearly said. There is no room E for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used ...

It has also been said by the Judicial Committee in *Oriental Bank Corp v Wright*[10] 'that the intention to impose a charge upon a subject must be F shown by clear and unambiguous language'.

On the retrospective operation of Acts, the presumption is that an enactment is not intended to have a retrospective operation unless a contrary intention appears. In this case, that presumption has been rebutted because s 1(5) of the Amendment Act states in clear terms that the amendment was intended to be retrospective. But a retrospective operation should not be G given to a statute to impair an existing right and it has been stated by the UK Court of Appeal in *EWP Ltd v Moore*[11] at p 891:

> ... that those who have arranged their affairs, as the saying is, in reliance on a decision of these courts which has stood for many years should not find that their plans have been retrospectively upset ... H

Moreover, one should avoid a construction that inflicts a detriment and as Lord Brightman has said in *Yew Bon Tew v Kenderaan Bas Mara*[2] [at p 2]:

> A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past. I

In this case it is clear that the taxpayer had an acquired right to exemption from tax under the Ordinance, when the Act came into force on 20 September

A 1967. That acquired right which was confirmed by the Special Commissioners of Income Tax in case No PKR 256 should only be overruled prospectively and not retrospectively. Admittedly, the legislature had made its intention clear in s 1(5) of the Amendment Act that s 16 therein which amended Sch 9 of the Act shall be deemed to have effect for the year of assessment 1968 and subsequent years of assessment. But the B Amendment Act did not also expressly provide that Pt I of the Interpretation Acts 1948 and 1967 which includes the said s 30 of that Act shall not apply. Therefore, following the decision of Viscount Dilhorne, Lord Diplock and Lord Edmund-Davies in the House of Lords case of *Floor v Davis (Inspector of Taxes)*,[4] the provisions of the Act must be construed having regard to the C Interpretation Acts 1948 and 1967. There is therefore a doubt whether the legislature had intended to impair the existing right of the taxpayer and inflict a detriment to it as it takes away a vested right under the existing law to exemption from tax. As there is a doubt, the ambiguity must be construed in favour of the taxpayer as the said exemption from tax has not been removed by sufficiently clear words to achieve that purpose. We therefore D allowed the appeal with costs here and below, set aside the decision of the learned judge and restored the deciding order of the special commissioners that the assessments be discharged. We also ordered that the deposit be refunded to the tax payer.

E *Appeal allowed.*

Reported by Prof Ahmad Ibrahim

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